RICHARD RUDNICK ET AL.

IBLA 95-429 Decided April 2, 1998

Appeal from a decision by the Ridgecrest Resource Area Manager, Bureau of Land Management, approving a plan of operations to conduct suction dredge mining on land patented under the Stock-Raising Homestead Act of 1916. CACA-35004.

Set aside and remanded.

1. Administrative Appeals: Generally--Appeals: Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals: Jurisdiction

   Jurisdiction over appeals of decisions issued under the Stock-Raising Homestead Act and its amendments lies with the Interior Board of Land Appeals.

2. Mining Claims: Special Acts--Stock-Raising Homesteads

   Minerals are reserved in patents issued pursuant to the Stock-Raising Homestead Act, 39 Stat. 862, as amended, 43 U.S.C. §§ 291-300 (1994), and are subject to disposal under the public land laws. However, the Act also prohibits damage to improvements and requires compensation for damages to crops. Parties holding mineral rights have the right to occupy so much of the surface as may be required for all purposes reasonably incident to mining the minerals if they obtain written consent from the landowner and pay for damages to crops and improvements or obtain a good and sufficient bond payable to the United States for the benefit of the surface owner.

3. Mining Claims: Special Acts--Stock-Raising Homesteads

   Under the Stock-Raising Homestead Act, as amended, parties other than the surface owner who locate mining claims on lands patented under that Act must file a notice of intent to mine with the Department and give notice to the surface owner. The Act prohibits mining related activities unless the claimant obtained either

written consent of the surface owner or authorization from the Secretary. Secretarial authorization is conditioned upon filing a plan of operations which includes procedures for minimizing damage to crops and improvements and disruption of grazing and other land uses, paying a fee to the surface owner for loss of income from ranching, and posting a bond or other financial guarantee.

4. Mining Claims: Special Acts--Stock-Raising Homesteads

When Secretarial authorization is required for mining minerals reserved under the Stock-Raising Homestead Act, as amended, the operator must post a bond sufficient to provide compensation for permanent damage to crops and tangible improvements, ensure reclamation, and compensate for the permanent loss of income from grazing and other land uses if the required reclamation does not allow the premining use to continue at the premining level.

5. Mining Claims: Special Acts--Stock-Raising Homesteads

The 1993 amendments to the Stock-Raising Homestead Act condition Departmental approval of operations without surface owner consent upon payment of a fee for the use of surface during mineral activities equivalent to the loss of income to the ranch operation.

6. Endangered Species Act of 1973: Section 7: Generally

Section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1994), requires each Federal agency to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat for such species. When the record contains no indication that, prior to issuing the decision on appeal, BLM considered whether endangered or threatened species or their habitat might be present in the proposed area of mining operations subject to approval by the Secretary of the Interior, the decision must be set aside to allow an opportunity for such determination.

APPEARANCES: Richard Rudnick, Bakersfield, California, pro se; Ben D. Rudnick, Onyx, California, pro se; John W. Nicoll, Mojave, California, pro se; Lee Delaney, Ridgecrest Resource Area Manager, U.S. Department of the Interior, Ridgecrest, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Richard Rudnick and Ben D. Rudnick have appealed a February 28, 1995, Decision issued by the Area Manager, Ridgecrest Resource Area, Bureau of Land Management (BLM or the Bureau), approving a plan of operations submitted by John Nicoll and authorizing Nicoll to conduct suction dredging operations on the Kelso Creek Placer #3 mining claim. Maps filed with the proposed plan of operations show the mining claim to occupy the SE¼, sec. 16, T. 28 S., R. 35 E., Mount Diablo Meridian, California.

The surface of the land subject to the Kelso Creek Placer #3 claim was patented under the Stock-Raising Homestead Act of 1916 (Stock-Raising Homestead Act), as amended, 43 U.S.C. §§ 291-300 (1994), and is presently owned by Ben E. Rudnick.

The approved mining operation consists of suction dredging to recover gold values. The dredging would be carried on by two individuals during daylight hours, 5 days a week. All excavation would be done by hand, with the exception of the initial formation of the pit (a hole 6 to 8 feet deep) from which the dredging operation would start. The site is located within the creek bottom and extends into the adjacent primary flood plain, which consists of unconsolidated river gravel and sand. After a site inspection, BLM's rangeland management specialist stated that the site contains six moderately sized willows and rabbit brush. No other vegetation that could be considered to be livestock forage is located on the site.

The Bureau approved Nicoll's plan of operations subject to a number of stipulations. Reclamation must proceed concurrent with mining, and the reclaimed area must be "recontoured to match the original streambed geometry, and the surface revegetated" by planting four container-grown willow trees and two cottonwoods. (Decision at 2.) An additional stipulation was imposed to mitigate the indirect loss of forage by limiting the time when operations could take place to no later than 4 p.m. in the months November through April and no later than 6 p.m. in May through October. The purpose of this limitation was to allow cattle to graze during the period when operations were not being conducted.

The Bureau concluded that, as a result of the mitigating measures imposed by BLM, Nicoll would not be required to pay compensation for the temporary loss of forage. This conclusion was based upon its finding that vegetation loss would be negligible because the affected area was small (0.16 acres) and the vegetation was sparse. Id.

A $2,500 bond Nicoll had filed with BLM in 1982 was deemed to be adequate if "applied to the present operation to cover reclamation costs" and "to pay compensation to the surface owner for any permanent damage to grazing land, surface improvements or land use." Id.

The BLM Decision, which was sent to both Nicoll and Ben Rudnick, stated that it could be appealed to the California State Director by filing a notice of appeal with the Ridgecrest Resource Area Office. Id. at 3.

Richard and Ben Rudnick filed separate notices of appeal on March 30 and 31, 1995. The Ridgecrest Resource Area Office then sent the case file to the California State Office, which forwarded them to the Board without a decision on the merits.

Upon initial review of the file, we noted a number of procedural irregularities. The case file did not show that Nicoll had been notified of the appeal or provided a copy of the Statements of Reasons. In addition, it did not show that Nicoll had been given two documents prepared by BLM in response to the appeal. The first was an April 21, 1995, report prepared by a BLM wildlife biologist discussing a number of endangered or specially protected birds that Richard Rudnick identified in his Statement of Reasons as known to use the area. The second was an undated and unsigned report apparently written by personnel in the Ridgecrest Resource Area Office, responding to the Rudnicks' Statements of Reasons. In addition, the cover memorandum forwarding the case file to the Board contained certain recommendations, but neither the Rudnicks nor Nicoll had been notified of the content of the cover memorandum.

By Order dated June 9, 1995, the Board provided copies of the documents to the Rudnicks and Nicoll. That Order established a briefing schedule, allowing Nicoll to file an answer and the Rudnicks and BLM to respond. We specifically requested that the parties address Richard Rudnick's arguments concerning the presence of endangered or specially protected birds and plants. Nicoll filed a response on July 17, 1995, but neither BLM nor the Rudnicks replied.

Jurisdiction

[1] The paragraph in the February 28, 1995, Decision informing the parties that they could appeal to the California State Director was incorrect. The record does not indicate the origin of that statement, but Nicoll's plan of operations was filed on a BLM "suggested form" which states that "information required by BLM is found at 43 C.F.R. § 3809.1-4." This suggests that the appeals paragraph may have been adopted from 43 C.F.R. § 3809.4. However, the surface management regulations at Subpart 3809 do not apply to operations on Stock-Raising Homestead lands. 43 C.F.R. § 3809.0-5(c). 1/ In any event, the appeal procedure set forth at 43 C.F.R. § 3809.4 applies only to operators, while other parties may appeal directly to the Board of Land Appeals. 43 C.F.R. § 3809.4(f). Nor does 43 C.F.R. § 3814.1 apply. That section addresses appeals of

1/ In other respects, the record indicates that BLM understood that the surface management regulations at Subpart 3809 did not apply. An undated, unsigned report titled "Compensation of Landowner Mining on Stock-Raising Homestead Lands Dry Creek Dredging" describes the 1993 amendments to the Stock-Raising Homestead Act and states: "This analysis does not stem from 43 C.F.R. § 3809."

decisions approving or rejecting a bond. 43 C.F.R. § 3814.1(d). 2/ Absent a specific regulation establishing a different procedure, decisions relating to the use and disposition of public lands are appealable to the Board. 43 C.F.R. § 4.1(b)(3). Consequently, jurisdiction over appeals of decisions issued under the Stock-Raising Homestead Act lies with this Board.

Bonding

Richard Rudnick argues that the $2,500 bond established in 1982 is not sufficient to meet reclamation costs. He argues that breaking the sod on the bottom and banks of the creek would allow the underlying sandy soil to erode, causing sedimentation damage to downstream riparian areas and watering holes.

In its Answer, BLM contends that, as approved, the mining operation will use a moving hole to collect the dredge tailing material and, as a result, a minimal amount of material will be transported downstream. (Answer at 1, 4.) It also notes that it found resodding unnecessary because the site "will naturally revegetate without assistance." (Decision at 2.) Consequently, BLM contends that the bond amount is sufficient to assure that the stream bottom will be recontoured and that the six trees will be planted, as called for in the mining plan. (Answer at 1.)

In response, Nicoll states that Kelso Creek is dry most of the year and that the creek bottom has little vegetation. (Response at 1-2.) He contends that the bond is sufficient because there will be no tree removal and that the few shrubs removed will be replaced. In addition, he states that the land value is not high enough to justify a larger bond. (Response at 2.)

[2] Patents issued pursuant to the Stock-Raising Homestead Act, supra, reserve to the United States "all the coal and other minerals * * * together with the right to prospect for, mine, and remove the same." 43 U.S.C. § 299(a) (1994). Reserved minerals are subject to disposal under the public land laws and qualified persons "have the right at all times to enter upon the lands" for that purpose. However, the Act also prohibits damage to improvements, and requires compensation for damages to crops. Id. Parties holding mineral rights have the right to "occupy so much of the surface * * * as may be required for all purposes reasonably incident

2/ The regulation continues to incorrectly state that appeals may be made to the Director of BLM. His authority to review appeals was redelegated to the Board of Land Appeals. 35 Fed. Reg. 12081 (July 28, 1970). After the Stock-Raising Homestead Act was amended in 1993 to require mineral locators to file a notice of intent, 43 U.S.C. § 299(b)(1) (1994), BLM amended 43 C.F.R. § 3833.1-2 and announced its intent to revise 43 C.F.R. Subpart 3814. 59 Fed. Reg. 44846, 44848, 44859 (Aug. 30, 1994); see 43 C.F.R. § 3833.1-2(c)(5). Modifications have not been promulgated. See 60 Fed. Reg. 60108, 60186 (Nov. 28, 1995).

to the mining or removal of the coal or other minerals" if they obtain written consent from the landowner and pay for damages to crops and improvements. Id. In the alternative, a mineral owner or claimant may obtain a "good and sufficient" bond payable to the United States for the benefit of the surface owner. Id. The bond assures compensation for damages to crops, tangible improvements, and permanent damage to grazing land. 43 U.S.C. § 299(a) (1994); Elmer Silvera, 42 IBLA 11, 15 (1979); see United States v. Browne-Tankersley Trust, 98 IBLA 325, 341 (1987). 3/ The amount of the bond is not determined by the nature or scope of the proposed operation, but is based upon the crops and improvements found on the lands covered by the mining claims on which the operations will occur and the value of the land for grazing. William and Pearl Hayes, 101 IBLA 110, 114-15 (1988); Brock Livestock Co., 101 IBLA 91, 98 (1988).

[3] The Stock-Raising Homestead Act was amended in 1993 to require parties other than the surface owner who locate mining claims on lands patented under the Stock-Raising Homestead Act to file a notice of intent with the Department and give notice to the surface owner. 43 U.S.C. § 299(b)(1) (1994). These amendments also prohibit other mineral related activities unless the claimant obtains either written consent of the surface owner or authorization from the Secretary. 43 U.S.C. § 299(c) (1994). Secretarial authorization is conditioned upon: (1) filing a plan of operations which includes procedures for minimizing damage to crops and improvements and disruption of grazing and other land uses; (2) payment of a fee to the surface owner for the loss of income from ranching; and (3) posting a bond or other financial guarantee. 43 U.S.C. § 299(e)-(g) (1994).

[4] The bond is to be "in an amount to insure the completion of reclamation" and to ensure:

> (A) payment to the surface owner, after the completion of such mineral activities and reclamation, compensation for any permanent damages to crops and tangible improvements of the surface owner that resulted from mineral activities; and
>
> (B) payment to the surface owner of compensation for any permanent loss of income of the surface owner due to loss or impairment of grazing, or other uses of the land by the surface owner to the extent that reclamation required by the plan of operations would not permit such uses to continue at the level existing prior to the commencement of mineral activities.

43 U.S.C. § 299(e)(1) (1994). The Act provides that "[i]n determining the bond amount to cover permanent loss of income * * * the Secretary

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3/ The Act of June 21, 1949, provided liability for "damage that may be caused to the value of the land for grazing" when prospecting, mining, or removing minerals by strip or open pit mining methods. 30 U.S.C. § 54 (1994).

shall consider, where appropriate, the potential loss of value due to the estimated permanent reduction in utilization of the land." 43 U.S.C. § 299(e)(2) (1994).

The case file includes several documents prepared when the bond was initially approved in 1982. A memorandum dated January 6, 1982, describes a meeting to discuss the operation then being proposed, which would have disturbed approximately 15 acres of land. That document states: "The offer of $2,500 bonding for each claim is more than adequate compensation for any grazing value that may be lost because of the proposed mining operation." Another memorandum dated March 17, 1982, states:

> The estimated replacement value of the spring development and livestock fences located on the claims near Tunnel Spring, which was the cause of most concern during the 1982 discussions, would be $2,000.00. Those improvements include a spring box, 100 feet of pipe and approximately 1/2 mile of 5 wire fence.

Richard Rudnick protested the sufficiency of the bond at the time. His appeal of BLM's rejection of his protest was dismissed by the Board in an Order dated May 6, 1982. A map accompanying the proposed plan of operations shows that the area to be mined does not include Tunnel Spring.

A report in the file titled "Compensation of Landowner Mining on Stock-Raising Homestead Lands Dry Creek Dredging" describes the requirements established by the 1993 amendments and states that the $2,500 bond "satisfies" the requirement to post a bond to cover the cost of reclamation and permanent damage to grazing land, improvements, and land use. It is important to note that the bond was initially deemed to be sufficient to assure compliance for a disturbed tract 15 acres in size, and the present approved disturbance is only 0.16 acres (an area less than 100 feet long and 70 feet wide), or approximately 1/100 the size of the originally contemplated mine area.

The amendments require a bond sufficient to provide compensation for permanent damages to crops and tangible improvements, ensure reclamation, and compensate for the permanent loss of income from grazing and other land uses if the required reclamation does not allow the premining use to continue at the premining level. Cf. William C. Hayes, 122 IBLA 68, 75-76 (1992) (rejecting argument that bond should cover reclamation).

The reports describing crops that might be damaged support a conclusion that the approved mining operations will not cause permanent damage to crops in the area to be mined. The simple reason is that the area to be mined is the creek bottom and the adjacent primary flood plain, which consists of unconsolidated river gravel and sand. It contains no growing crops. Similarly, no mention is made of any improvements in the 0.16-acre mine site in either the reports in the case file or the Statements of Reasons. Having no reason to believe that any improvements exist, we cannot

conclude that BLM erred by not considering the value of improvements when setting the bond amount. Further, there is no evidence that, if the reclamation called for in the plan of operations is carried out, there will be any permanent loss of use. Notwithstanding this fact, if no reclamation is done and all of the land is lost to crop production, the bond is sufficient to compensate for loss of land valued at more than $15,000 per acre.

Compensation

[5] The Rudnicks also object to BLM's failure to establish a payment for the loss of grazing while mining occurs. Ben Rudnick states that he grazes more than 100 head of cattle in the area which will be affected and alleges that his loss would be $1 per head per day.

The 1993 amendments to the Stock-Raising Homestead Act condition Departmental approval of operations without surface owner consent upon "payment of a fee for the use of surface during mineral activities equivalent to the loss of income to the ranch operation * * *." 43 U.S.C. § 299(f)(1)(c) (1994). The Bureau's decision not to require payment of a fee was based upon a report dated February 16, 1995, prepared by a rangeland management specialist after an inspection of the site. He states that the loss of forage as a direct result of operations would be less than 1/2 acre and less than 1 animal unit month (AUM) per year. He notes that the value of the forage, as determined by the National Agricultural Statistics Service, is $9.70 per AUM.

Recognizing that cattle tend to stay away from areas of human activity, he also recommended the limitation on hours of operation adopted in the Decision, and the final plan of operations requires Nicoll to cease mining operations by 4 p.m. during the winter and 6 p.m. during the summer to facilitate grazing. The area directly affected by the mining operation is 0.16 of an acre and any amount due would be minimal.

The Rudnicks, however, are correct that BLM failed to require payment of compensation for the loss of income from ranching as required by the Act. The record is sufficient to determine the compensation amount, and we would do so if we did not find it necessary to remand this the case to BLM for reasons set out below. 4/ On remand, BLM should establish a reasonable compensation for loss of income from ranching.

4/ The loss of forage as a direct result of operations would be less than 1/2 acre and less than 1 AUM per year, and the value of the forage, as determined by the National Agricultural Statistics Service, is $9.70 per AUM. It therefore appears that payment of $10 per year to Ben E. Rudnick as compensation for the value of the forage lost as a result of the mining operations would be sufficient compensation, as the Rudnicks do not contend that the restricted hours of operation are inadequate to mitigate indirect effects.

Endangered Species Act

Richard Rudnick argues that the mining operation will affect endangered or threatened species. In commenting on the proposed plan of operations, he indicated that the Kelso Creek monkeyflower and the Piute Mountain navarretia were in the area and were under consideration for listing as endangered species. His Statement of Reasons again mentions them and additionally asserts:

> Numerous species of endangered or specially protected birds have been documented as using this area. The Yellow Billed Cuckoo, Willow Fly Catcher, Summer Tanager, and Yellow Warbler are some of the birds that have been seen using the area. No study has been completed to show the effects of this operation.

The Bureau's Answer states that the Piute Mountain navarretia is a category I species found in mountain woodlands at elevations of 5,000-7,000 feet and has been found 21 miles west of the site. It states that the monkeyflower grows in Joshua Tree and Pinyon-Juniper woods and has been seen several miles north of the site, but was not observed at the site. The Bureau additionally notes that the wildlife biologist's report "has been sent to the Fresno Office of the California Department of Fish and Game who have jurisdiction over threatened and endangered species on private land in California" and that any operating conditions stemming from compliance with the California Endangered Species Act will be separate from its Decision.

The wildlife biologist's report describes the habitat needs of the yellow-billed cuckoo (Coccyzus americanus), willow flycatcher (Epidonax traillii), southwestern willow flycatcher (Epidonax traillii extimus), and yellow warbler (Dendroica petechia) and states: "Of the above mentioned avian species, I observed only flycatchers during my visit to the site." 5/ She reports having been told by the chairman of the Santa Monica Bay Audubon Society that he had "documented and photographed a yellow-billed cuckoo three miles north of the site, and has observed all the other above mentioned avian species in the proposed area of operations." After describing the habitat needs of the summer tanager (Piranga rubra), the report evaluates impacts on the four species. It states that the mining operation is unlikely to affect yellow-billed cuckoo and summer tanager because the area does not have the appropriate habitat, but that it could impact the yellow warbler because it "is common in this area and the proposed area of operations offers ideal habitat for this bird." Additionally, the report states that mining could impact the Southwestern willow flycatcher "as it is within the breeding range of this bird."

5/ The biologist also reports: "Northern flickers (Colaptes auratus), red-tailed hawks (Buteo jamaicensis) (a nesting pair), white-crowned sparrows (Zonotrichia querula), and turkey vultures (Cathartes aura) were present in the area during the assessment."

[6] Section 7 of Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), requires each Federal agency to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a) (1994). The ESA further requires each Federal agency to confer with the Secretary of the Interior on any agency action likely to jeopardize the continued existence of any species proposed to be listed or to result in the destruction or adverse modification of critical habitat proposed to be designated. 16 U.S.C. § 1536(a)(4) (1994). Regulations implementing the ESA require an agency to determine whether its actions "may affect" listed species or critical habitat. 50 C.F.R. § 402.14. When Federal action is likely to jeopardize the continued existence of any proposed species or adversely modify proposed critical habitat, the agency is required to confer with the U.S. Fish and Wildlife Service. 50 C.F.R. § 402.10.

The record contains no indication that, prior to issuing the Decision on appeal, BLM considered whether endangered or threatened species or their habitat might be present in the proposed area of operations. When the matter was raised, the wildlife biologist reported that the mining operation "could impact" the southwestern willow flycatcher, an endangered species. See 50 C.F.R. § 17.11. Although the document is captioned a "biological assessment," it does not analyze or otherwise evaluate possible effects on the species or its habitat. See 50 C.F.R. §§ 402.02 and 402.12. Once BLM ascertained that an endangered or threatened species was known to be present in the area, it was required by the ESA to determine whether its action of approving the proposed mining operation "may affect" the species or its habitat and, if so, consult with the U.S. Fish and Wildlife Service. See Kendall's Concerned Area Residents, 129 IBLA 130, 141-42 (1994). Whatever the authority of the California Department of Fish and Game and whatever conditions it might impose under California law, BLM was not relieved of its obligations under the ESA. Lacking a record showing compliance with the ESA, the Decision must be set aside.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the Ridgecrest Resource Area Manager is set aside, and the case file is remanded to BLM for further action consistent herewith.

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R.W. Mullen
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge